92-1798

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER, ALLEN E. BARSETH, *ET AL.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND UNITED AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In duty of fair representation cases:

1. Is a labor union's bad faith bargaining away of existing employment rights of employees it dislikes, in order deliberately to harm them, reviewable only on the deferential standard applied to good faith but allegedly arbitrary union acts under *Air Line Pilots Association v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991)?

2. Are the following grounds proper ones, consistent with this Court's decisions in the area, to uphold a union's deliberate harming of such disfavored employees—

(a) a union's economic interest in discouraging the future hiring of permanent strike replacements is a "rational" reason to discriminate against any in the bargaining unit, even years after the strike has been settled?

(b) a rational explanation could be conceived for the conduct, although the union has been found not to have acted on that basis?

3. If a union acted for mixed motives, one of which was improper, is it automatically absolved of any violation of the duty if any of its other motives was proper?

PARTIES TO THE PROCEEDING

Petitioners Lee Rakestraw, John L. Barker, Allan E. Barseth, *et al.*, were Plaintiffs in the District Court, and Appellees, Cross-Appellants (against the Air Line Pilots Association), and Appellants (against United Airlines), in the Court of Appeals for the Seventh Circuit.[1]

[1] The following persons, all plaintiffs below, are petitioners in this Court: Lee Rakestraw, John L. Barker, Allan E. Barseth, Michael Bloodhart, Michael P. Bove, Alfred Breen, Hal R. Breeze, James E. Brice, Carter Brusch, Urs Buehler, Mark I. Burnette, Duane E. Chance, Robert M. Chisholm, Eugene J. Ciarmatori, Thomas S. Clark, Peter H. Coebergh, Vaughn Beasly Cordle, Mohammad Daoud, Glen Dietz, Stephen J. Dreiling, Clifford Ehorn, Kenneth R. Eisemann, John A. Eisenhart, Michael Sultan Etezadi, Leonard D. Graves, Gary Green, Douglas C. Hawkins, G. Lynn Henish, Glen C. Hermecz, J. Robert Hogan, Curtis E. Holley, Kenneth L. Hopfer, Stephen L. Howard, Peter A. Jarldane, Michael E. Jones, Al Khosh, James P. Killoran, William A. Kirkland, Norman H. Kitchens, Robert J. Klein, Dean E. Krull, James D. Laing, Rodney H. Lambertz, Robert K. Lane, Ralph A. Lennen, Ted Lewis, David A. Lippard, Edwin C. Loomis, Richard J. Lussow, James Many, James D. Marquis, Richard V. Massegee, Charles C. Monch, Frank Mostofi, John R. Pasley, Ralph D. Pate, Michael J. Peet, Richard W. Pletan, Allan R. Poulin, Earl J. Pounds, Paul H. Rafalowski, Larry B. Reese, Thomas A. Repas, Norman O. Rosen, Norman G. Rosendale, Philip G. Roth, Wallace B. Ruch, John A. Sasso, James A. Savage, Jerry Scarboro, Bill Schoen, Charles H. Schneider, John M. Snow, Robert B. Somerville, Robert D. Spencer, George R. Spillman, Ronald B. Stark, John F. Steiner, Eugene E. Stocker, John F. Sullivan, Ralph E. Tallent, Robert G. Thomas, Eugene S. Thomason, Steven H. Van Jepmond, Mary K. Vaughn, Ralph P. Venezia, Jr., Robert A. Wenberg, Alivia L. Wheeler, Raymond C. Winn, Charles F. Young and Raymond H. Young.

In addition to the petitioners, the following persons were also plaintiffs in the District Court and Appellees, Cross-Appellants, and Appellants in the Court of Appeals for the Seventh Circuit:

(Footnote continued on following page)

Respondent Air Line Pilots Association, International, was a Defendant in the District Court, and Appellant and Cross-Appellee in the Court of Appeals.

Respondent United Airlines, Inc., was a Defendant in the District Court and an Appellee in the Court of Appeals.

---

[1] *continued*

John Bodanske, Ken Cook, John Crawford, Joe Dye, Vanita Gallo, Peter Gropp, Darrell Jelle, Jim Logg, James Mott, Greg Newman, James Nicholes, John Novak, Jerry Smith, Bill Stout, Ray Stropes, Larry Sutton, Francis Vancini and James Wilhite.

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Lee Rakestraw, John L. Barker, Allan E. Barseth, *et al.*, petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit and its Judgment (App. 1-26) were entered on December 28, 1992. The Opinion is reported at 981 F.2d 1524. The Opinion of the two Judges dissenting from the denial of rehearing *en banc* (App. 27-33) is not yet reported. The Opinion of the United States District Court for the Northern District of Illinois of May 30, 1991, is reported at 765 F. Supp. 474.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on December 28, 1992. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was filed on January 11, 1993, and denied by Order of April 6, 1993. (App. 27-33.)

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners are pilots hired by United Airlines ("United") as permanent replacements during a May 1985 strike. This case arose from a campaign of the Air Line Pilots Association ("ALPA") to reverse their seniority positions. ALPA sought to place ahead of them on United's seniority list another group of pilots (known as "the 570") who, while United trainees, had honored the picket line in 1985 though United had informed them that they would not become United employees if they did not report.

In a prior decision, *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) ("*ALPA*"), the Seventh Circuit held that the 570 had not become United employees under the Railway Labor Act by May 1985 and therefore United had no obligation to hire them. 802 F.2d at 892, 913-14 and n.19. On April 3, 1987, after certiorari was denied, ALPA and United entered into an amendment (the "1987 agreement") to the collective bargaining agreement ("CBA") to resolve post-

strike issues. United agreed to extend new offers of employment to the 570 (who had worked at United pursuant to the district court's injunctive order, which the Seventh Circuit reversed), but with seniority behind the petitioners. ALPA agreed that that seniority adjustment "fully, finally and forever" resolved all disputes with United concerning the seniority of the 570 (App. 55) and that ALPA would "never" again renegotiate the relative seniority of the 570; "nor will it seek to . . . raise the issue of the 'group of 570' relative seniority position as part of any future negotiations between [United and ALPA] regarding any subject whatsoever." (App. 54.) ALPA also agreed to take no reprisals against petitioners. (App. 55.)

From the 1987 Agreement until after the decision below was rendered, petitioners remained ahead of the 570 on United's seniority list. However, beginning "within days" of signing the 1987 Agreement, ALPA tried to undo it. (App. 58.) Finally, in return for major economic concessions by ALPA costly to all members of the bargaining unit, United in 1991 agreed to amend the CBA to reverse the seniority and put the 570 ahead of petitioners. (App. 61-62.)

Petitioners brought suit in the district court to enjoin the implementation of that provision of the 1991 CBA, basing jurisdiction on 28 U.S.C. §1331, and pendent jurisdiction over certain state law claims. They alleged, *inter alia*, that ALPA had violated its duty of fair representation[2] toward them as members of the bargaining unit (a violation in which they alleged United had participated); and that their rights as third party beneficiaries of the

[2] The duty, in the context of this case, is implied under the Railway Labor Act, 45 U.S.C. § 151, and is necessitated by the due process clause of the Fifth Amendment. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-99 (1984).

1987 Agreement, as well as certain contractual commitments made by United in offering them employment, had been breached.

The district court enjoined the implementation of the new seniority provision, holding that ALPA had violated its duty of fair representation toward petitioners. It rejected petitioners' other claims, and dismissed United as a party. (App. 76-84.)

The Seventh Circuit fully accepted the findings which the district court considered to justify the injunction. (App. 19.) The Seventh Circuit noted (App. 8-9) that the gist of the district court's findings was that ALPA's actions concerning seniority were part of a "six-year vendetta" against the replacements; that "ALPA's leaders promised guerilla warfare against the . . . replacement pilots," who "were harassed in and out of cockpits—with the active and thoroughly illegal support of ALPA's leadership . . .;" and that ALPA had obviously disregarded its agreement not to reopen the seniority issue and to eschew reprisals against petitioners. ALPA's actions, and its many overt demonstrations of hostility toward petitioners, were detailed by the district court. (App. 58-71.) The Seventh Circuit noted that "ALPA's leadership, like many of United's pilots, detested the strike-breakers and wanted revenge, by means fair or foul." (App. 19.)

The district court found that "the evidence clearly demonstrates that ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly" (App. 70 and n.11), thus rejecting ALPA's main argument that some valid reason other than hostility to replacements explained its actions concerning seniority. It ruled that "ALPA has acted in bad faith in negotiating to reverse the relative seniority rights of [petitioners] in the 1991 collective bargaining agreement." (App. 75-6.)

The Seventh Circuit reversed. It held ALPA's actions justified as part of the compromise that unions must make among elements in the bargaining unit; that "[b]argaining has winners and losers" and petitioners were simply losers in that process. (App. 12.) It also held that ALPA could have bargained to favor the 570 over petitioners in settling the strike (App. 20), and it made no difference that the action at issue was a reversal of seniority years later, and abrogated ALPA's own agreement that the subject was closed forever. (App. 21-22.)

The Seventh Circuit disparaged reliance in *ALPA v. O'Neil*, 499 U.S. ____, 111 S. Ct. 1127 (1991), on "[b]uzzwords such as 'bad faith' and 'arbitrary' [as] being empty . . . ." (App. 15.) It held that mixed with ALPA's desire "to harm the replacements" were two rational justifications: first, ALPA "wanted to restore the normal seniority arrangements [at] United . . . .;" and second, ALPA had institutional reasons "to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management." (App. 22.)[3]

A petition for rehearing and suggestion for rehearing *en banc* were denied, with two judges dissenting. (App. 27-33.) The dissenting judges rejected the standard used by the panel to determine that ALPA did not violate its duty of fair representation. The dissent observed that the panel opinion "boils down the [*O'Neill*] inquiry into a single factor: If the union acted so as to benefit the workers

[3] The Seventh Circuit decided this case together with *Hammond v. Air Line Pilots Assn.*, No. 91-2957 (7th Cir. 1992). Although the same incorrect legal standards were applied to *Hammond* as to this case, *Hammond* arose from a different controversy, is factually dissimilar, and was decided by a different district judge, who denied the plaintiffs their relief.

as a whole, then it did not breach its [duty of fair representation]." (App. 31.) The dissenters considered the panel's analysis to deviate from established law of the Supreme Court and to place the Seventh Circuit in conflict with several other circuits. (App. 28.)

REASONS FOR GRANTING THE WRIT

The decision below presents important issues as to the scope of a union's duty of fair representation, especially its duty to replacements, who, after a strike has been settled, remain part of the bargaining unit. That decision departs from rulings of this Court and conflicts with rulings of other circuits.

1. In holding consistent with the duty of fair representation a "six year vendetta", in which ALPA acted in bad faith to strip plaintiffs of seniority rights to which ALPA itself had agreed, the Seventh Circuit disregarded this Court's decisions in *ALPA v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991), and *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Those decisions establish a "tripartite standard" for duty of fair representation cases, which demands that unions refrain from arbitrary, discriminatory or bad faith actions. The Seventh Circuit held that terms such as bad faith are "empty" ones, and that ALPA's concededly animus-driven behavior should be judged solely by the relatively deferential test used in applying the arbitrariness part of the standard. ALPA was then absolved of any violation on the ground that it also had "rational" reasons for its actions.

As the Seventh Circuit judges dissenting from the denial of rehearing *en banc* noted (App. 28), the ruling below not

only "deviates from established law of the Supreme Court," but "places this circuit in conflict with other circuits . . ." As the dissenters stated (App. 29), other circuits after *O'Neill* have held the three categories to be distinct and cumulative, and have restricted the deferential review to claims of arbitrariness. *E.g., Carter v. United Food and Commercial Workers, Local 789*, 963 F.2d 1078, 1082 (8th Cir. 1992).

Review should be granted to resolve this conflict and to determine whether the other circuits and the dissenters below are not correct in considering that "[a]ll of *O'Neill's* references to deference and 'a wide range of reasonableness' relate only to whether the union acted arbitrarily, not whether it acted discriminatorily or in bad faith." (App. 30.)

2. The Seventh Circuit also held that a union's economic interest in discouraging hiring of replacements was a sufficient and valid reason to discriminate against them in seniority matters. That holding is at odds with the requirement that unions represent fairly "all" bargaining unit employees, *O'Neill*, 111 S. Ct. at 1134. It was taken to the extreme that reversing relative seniority relationships within a unit, to the detriment of a shunned minority, was held to be rational years after the relationships had been settled, though there have been no intervening events. The Seventh Circuit thought that such seniority could have been set against the petitioners initially or in a strike settlement, and jumped to the conclusion that ALPA therefore was unrestrained thereafter in any efforts to reverse the seniority that had been granted. This frustrates the legitimate expectations of such employees and invites instability in labor relations. It again departs from prior law on the subject.

The Seventh Circuit cited, as the only other reason it thought justified ALPA's behavior, one that the district court found was not an actual reason ALPA acted; that is, that ALPA allegedly wanted to conform the seniority practices to historical ones. In other contexts parties may not rely on pretextual reasons for their conduct, and logic suggests that they should not be able to do so in fair representation cases.

These holdings merit further review, for they stretch the concept of rationality so far beyond deference that they undermine the fundamental tenets of the duty and sound labor policy.

3. The court below also held that in mixed motive duty of fair representation cases, the union automatically wins if any of its motives was valid. That position, too, is rejected in all parallel contexts, *e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-54 (1989), and this Court should determine whether it is permissible in fair representation cases.[4]

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[4] United was joined as a defendant, and is a respondent to this petition, because plaintiffs allege that United participated in ALPA's breach of the duty of fair representation, and also urge that United should be joined to "insure complete and meaningful relief." *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 329 (1969).

The Seventh Circuit's holding that United is not liable (App. 22-23) follows and appears to be derivative of the absolution of ALPA from liability, but in *dictum* that court also implied that an employer pursuing its separate economic interest could never be responsible for a union's violation of the duty, at least if it held no malice toward the affected employees. That point was settled to the contrary of the *dictum* by *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976); see also *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977).

In petitioners' view, should certiorari be granted and the judgment below be reversed, the issue of United's liability should be remanded for further consideration.

I.

IN DUTY OF FAIR REPRESENTATION CASES, "BAD FAITH" AND "ARBITRARINESS" TESTS ARE SEPARATE AND ARE CONSIDERED UNDER DIFFERENT STANDARDS OF REVIEW.

In *ALPA v. O'Neill*, 111 S. Ct. 1127, 1134-35 (1991), this Court unanimously reaffirmed its holding in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), that the duty of fair representation requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." It made clear that this is a "tripartite standard," each part of which the union must meet.

The court below disparaged the phrase "bad faith" as "empty" and an "epithet" lacking intrinsic meaning. (App. 11-15.) Effectively, it reduced all three parts of the *Vaca-O'Neill* standard to a single test for allegedly arbitrary but concededly good faith conduct: whether there was any rational ground for the union's action. That is not the law, and the panel's implication that *O'Neill* supports such a position (App. 13) cannot be squared with the text of *O'Neill*. In *O'Neill* itself this Court "express[ed] no opinion on whether respondents have put forth a triable issue concerning whether ALPA acted in bad faith," *id* at 1133, n.6, and remanded that question.[5]

As the Seventh Circuit judges dissenting from the denial of rehearing *en banc* noted (App. 28-29), the decision below conflicts with rulings of other Circuits. The Eighth

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[5] On remand, the Fifth Circuit proceeded to decide that issue, holding that there was no bad faith in the particular case, 939 F.2d 1199 (5th Cir. 1991). Under the Seventh Circuit's ruling in this case, however, that entire procedure would have been futile and unnecessary.

Circuit has rejected explicitly the very merging of the three parts adopted here, and has held that "[t]he 'wide range of reasonableness' standard [of *O'Neill*] applies only to allegedly *arbitrary* union conduct," *Carter v. United Food and Commercial Workers, Local No. 789*, 963 F.2d 1078, 1082 (8th Cir. 1992) (emphasis original); and other Circuits have done so implicitly, *Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, 940 (1st Cir. 1992) (standard stated in disjunctive); *Perry v. Million Air*, 943 F.2d 616, 619 (6th Cir. 1991) (same); *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 940-42 (9th Cir. 1992).[6]

Nor does logic suggest that an intentional harming of disfavored minority employees in the unit should not be reviewed on the same relatively lenient standard as the mere carelessness alleged in *O'Neill*. A higher level of judicial oversight for bad faith is warranted because it implicates a union's fiduciary duty of loyalty. 111 S. Ct. at 1134. This Court has long phrased the requirement that unions act "in complete good faith and honesty" as a condition to the sustaining of their discretionary acts. *Id.*; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1945). The dissent also observed that the panel opinion severs the duty of fair representation from its roots in securing representation for all workers, even unpopular ones. As the two dissenters from denial of rehearing en banc noted, "[all] of this deference ignores that the concept of the duty of fair representation was created to protect minority interests, and by necessity, places a limit on majority rule." (App. 32.)

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[6] In *Jones* the Ninth Circuit also held it significant to the degree of scrutiny applied that the union was the initiator of the disputed action, rather than merely being accused of insufficient resistance to employer initiated actions. 968 F.2d at 940.

The setting of the appropriate standard of review is important to workers, unions, employers and the bar, *see Dober v. Roadway Express, Inc.*, 707 F.2d 292, 295 (7th Cir. 1983), and the conflict should be resolved. As *Dober* reflects (see the concurring opinion, *id.* at 296), before *O'Neill* the Seventh Circuit had taken a uniquely narrow view of the duty, ruling out any liability for unintentional union conduct. Moreover, the dissenting opinion below similarly notes: ". . . this circuit has already been criticized by the Supreme Court for its crabbed interpretation of the duty of fair representation . . . (citing *O'Neill*, 111 S. Ct. at 1134)." (App. 33, n.2). The present decision comes full circle, returning to a uniquely narrow position, this time one rendering wilfulness irrelevant.

Before the present decision, it was long thought that the clearest possible violation of the duty was "hostile discrimination," see, *e.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944); *Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (actions must be "without hostility"); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 200 (4th Cir. 1963) (discrimination based on lack of active union membership is hostile and forbidden). Petitioners urge this Court to consider whether the Seventh Circuit has not unsettled what *O'Neill* and decades of cases before it had settled.[7]

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[7] There is no warrant for the Seventh Circuit's reasoning that (App. 11) "bad faith" should not be a talisman because that term is hard to define. Its earlier decision in *Bennett v. Glass Workers Local 66*, 958 F.2d 1429, 1438 (7th Cir. 1992), as observed by the dissent on denial of the rehearing petition, had noted that the appropriate response to the fact that "[i]ntent is a slippery matter", is recognition that "deference to the trier is particularly important when it comes to findings involving scienter."

II.

THE COURT BELOW HELD "RATIONAL" REASONS FOR UNION CONDUCT WHICH ARE THE ESSENCE OF ILLEGALITY, OR WERE NOT THE REASONS WHICH MOTIVATED ALPA, AND FAILED TO FOLLOW PRECEDENT WHICH HOLDS REVERSALS OF SETTLED SENIORITY TO BE ARBITRARY.

A. Punishing Minority Employees to Further a Union's Institutional Objectives is an Improper Motive, Not One Rendering its Actions "Rational," Especially if it Occurs Years After the Fact.

The court below held that it is a rational reason, dispelling arbitrariness, for a union deliberately to punish replacements to enhance its future bargaining strength, for the supposed benefit of the unit as a whole. (App. 21-22.) This makes a virtue of the very kind of activity heretofore thought to be the essence of a duty of fair representation violation. In effect, the court has said that as unions always have an institutional reason to oppose replacements, there is at most a very attenuated duty to represent them fairly.[8] That holding is unprecedented; literally the seminal cases demand that unions represent "all" members fairly, *e.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944); *Vaca v. Sipes*, 386 U.S. at 177; *O'Neill*, 111 S. Ct. at 1134.

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[8] The Seventh Circuit added (App. 16) that the union had a duty to refrain from shooting replacements or, possibly, reducing non-strikers pay in the collective bargaining agreement. The suggestion that there exist such limitations on denying benefits to replacements only exposes a severe flaw in this decision. For, if such discrimination were "rational" due to the union's economic interest in opposing their employment, the court's primary reasoning, taken to its logical extreme, might justify harming replacements indefinitely in all aspects of pay, seniority and all other employment benefits.

If there be some perverse "rationality" in a union's deliberately harming one segment of a bargaining unit in order to increase its own future economic power, it is one that other Circuits have held to work against defendant unions. These circuits have considered the fact that a disfavored minority of employees has been singled out for unfavorable treatment for such political reasons as rendering the action at least suspect, if not dispositive that a violation has occurred, rather than as an affirmative justification for the union's actions. *E.g.*, *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 614 (1st Cir. 1987); *Goclowski v. Penn Central Trans. Co.*, 571 F.2d 747, 758-61 (3d Cir. 1977); *Jones v. TWA*, 495 F.2d 790 (2d Cir. 1974). The ruling below conflicts with those decisions. A union may gain future economic power in relation to an employer by many different kinds of actions which discourage or throttle minorities in the bargaining unit. If that be a reason sustaining its actions, the very core purpose of the duty to protect minorities (see the dissent at App. 32) is severely compromised.

The Seventh Circuit compounded its abnegation of any meaningful duty of fair representation to petitioners by holding that the state of affairs it sanctioned may exist indefinitely. That court saw no difference between a choice of seniority status among groups made by a union initially or upon an intervening event such as a merger of carriers, and one which reverses established seniority to the advantage of a favored majority absent any intervening event.[9] But that is a distinction widely recognized in the

[9] Petitioners certainly do not "all but concede" (App. 20) that ALPA and United could have agreed in their back-to-work agreement to subordinate petitioners' seniority to that of the 570. Rather, petitioners argued to the contrary, citing such cases as *Teamsters*

(Footnote continued on following page)

law, for good reasons. For example, in *Barton Brands Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976), the court expressly made the distinction here rejected. It noted that the line of cases relied on here:

> "all involved endtailing decisions made at the time of the initial acquisition rather than after the employees had been dovetailed into the acquiring firm's unit. In these cases the affected employees, unlike the employees in the case at bar, did not lose benefits they believed they were entitled to, nor were they prejudiced by relinquishing other employment opportunities in reliance on the dovetailing arrangement."

Accord, Air Wisconsin Pilots v. Sanderson, 909 F.2d 213, 216 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *DeBoles v. TWA, Inc.*, 552 F.2d 1005, 1016 (3d Cir.) (distinguishing case from "union attempt to reduce or cancel seniority benefits already conferred upon a minority in a pre-existing agreement"), *cert. denied*, 434 U.S. 837 (1977); *Hargrove v. Brotherhood of Loc. Engineers*, 116 F. Supp. 3 (D.D.C. 1953) (arbitrary reversal of seniority positions held for three years invalid).

O'Neill itself appears to endorse the distinction, noting that "[a] rational compromise *on the initial allocation of the positions* was not invidious 'discrimination' of the kind prohibited by the duty of fair representation," and that the particular adjustment was warranted because it "did not permanently alter the seniority system," 111 S. Ct. at 1137 (emphasis added).

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[9] *continued*
Local Union No. 42 v. NLRB, Goclowski v. Penn Central Transp. Co., and *Jones v. TWA*, all discussed in the text above. See the Consolidated Response and Opening Brief filed by petitioners in the Seventh Circuit, at 36. Petitioners urged that a reversal of seniority rights years after the fact, with no intervening events, added a further dimension to ALPA's conduct, which by itself was dispositive that it violated the duty.

The logic of this distinction is not only that the justifiable reliance of employees like petitioners on the practice previously agreed to by the union should not be thwarted where no new event has made that necessary, but that otherwise, "disputes over seniority would fester—as they have done in this case . . . ." *Air Wisconsin*, 909 F.2d at 216. The decision below undercuts both objectives and should not stand. It also too readily excused ALPA's repeated undermining of its own agreement permanently to end this seniority dispute, and to avoid reprisals, and rewarded ALPA's active disruption of stability by allowing it to invoke alleged continuing dissatisfaction within the bargaining unit as to seniority as a reason to undo its own agreements.

In *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 792 (1990), this Court, in holding that a union does not automatically lose its status as bargaining representative if after a strike a majority of the unit should be composed of replacements, relied in part on the fact that interests may converge "after the strike, once job rights have been resolved . . . ." The corollary to this holding must be that at least after a strike has ended, the union's general obligations to replacements under the duty of fair representation apply fully. Thus this issue is logically related, and of similar importance, to that decided in *Curtin-Matheson*.

This decision puts in doubt whether replacements ever effectively can enforce the duty of fair representation, and in doing so impinges on this Court's holdings that they can lawfully be hired[10] by allowing them to be treated as second-class citizens within the bargaining unit.

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[10] *E.g., TWA v. Int'l Federation of Flight Attendants*, 489 U.S. 426 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

It presents issues important not only to a union's relationship to replacements, but more generally to what union conduct is "rational" under *O'Neill*, which should be reviewed by this Court.

B. A Reason for Which a Union Did Not Act Cannot Render Its Actions "Rational." Nor is It Rational to Favor Non-Employees over Employees in Seniority.

The other reason the Seventh Circuit cited as making ALPA's action rational, to put seniority of the 570 and petitioners on the same plain as historical treatment of prior trainees, was explicitly found by the district court not to be the actual reason that ALPA acted (App. 70-71), a finding the court of appeals did not challenge. As the district court made clear, the historical treatment excuse was pretextual; among other things, the 1991 CBA did not treat petitioners like prior trainees. (App. 70.)[11] Also, as the 570 were not even employees at the relevant time, it is arbitrary to favor them in seniority over petitioners, who did have that status.

In analogous contexts under the civil rights laws, a party "may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of decision." *Price Waterhouse v. Hopkins*, 490 U.S. at 252. In not

[11] The Seventh Circuit in its prior *ALPA* decision held that the 570 were not United employees in May 1985, and had no employment rights, because they were not on its payroll, and had been informed that they would never become employees unless they reported at the outset of the strike. 802 F.2d at 910-13. Thus they inescapably were not similarly situated to other former trainees of United, who had been on the payroll and employed from the outset of their training.

holding ALPA even to that rule, the Seventh Circuit compounded its confusion of the three distinct portions of the *O'Neill* test. It considered that a "legislative" review standard sanctioned reliance on any possibly rational ground, even if its invocation was pretextual. There are two basic flaws in that analysis: first, as shown above, that standard is not appropriate to allegations that a union has deliberately sought to harm a disfavored group. Second, however, *O'Neill* never suggested that pretextual reasons can carry the day under any standard, or that a long course of meretricious behavior such as ALPA's gains credence if its ultimate fruition is in an amendment to a collective bargaining agreement.

Even in reviewing purely legislative classifications, the courts do not accept ones ostensibly neutral, but which are pretexts for discrimination or which reflect a purposeful discriminatory intent. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222, 228, 231-32 (1985); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (where there is "proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified"). And, even where some analogy to legislative acts is appropriate in fair representation cases, it should not be carried to the excess of rendering a union's motive irrelevant or unreviewable, for the reasons which may limit inspection of legislative bodies' motives—difficulty in ascertainment due to the large number of legislators, and reluctance of a court to question the *bona fides* of a co-equal branch of government—have no relevance to review of union actions.

III.

THE EXISTENCE OF A "MIXED MOTIVE" FOR A UNION'S ACTIONS COULD NOT NEGATE ITS VIOLATION OF THE DUTY OF FAIR REPRESENTATION.

The Seventh Circuit considered this a "mixed motive" case, and stated that "a bad motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole." (App. 20.) As shown above, ALPA had no legitimate reasons for its actions; the ones relied on by the Seventh Circuit were either demonstrative of a failure to represent "all" employees fairly and therefore improper as a matter of law, or not ones on which ALPA had acted. Thus, this should not have been viewed as a genuine mixed motive case, in which a party acted for illegal and legal motives both, *Price Waterhouse*, 490 U.S. at 258.

But if it were so considered, and a standard at least equivalent to that applied in Title VII cases were adopted for fair representation cases, the union would be liable unless it proved that it would have taken the same action absent the illegal motive. *Id.*, 490 U.S. at 252-54; *also cf. Hunter v. Underwood*, 471 U.S. at 231-32 (rejecting view that the existence of a permissible motive "trumps any proof of a parallel impermissible motive"). ALPA was not held to any such standard by the Seventh Circuit; it proved nothing of the sort, and surely would not have engaged in the six-year course of conduct involved here absent anti-replacement animus.

Petitioners submit that a *stronger* standard should apply in duty of fair representation cases. The tripartite test holds that a bad motive *does* spoil actions aimed at harming particular disfavored employees. The duty is a fiduciary one, *O'Neill*, 111 S. Ct. at 1134, flowing from the fact that unions have exclusive bargaining power to ex-

ercise on behalf of unconsenting individuals, including ones with whom it shares a mutual dislike. This circumstance suggests that the law must demand professionalism in union bargaining activities, and therefore suppression of grudges against unpopular employees in the bargaining unit.

While application of the *Price Waterhouse* standard would have led to an affirmance of the injunction here, adoption of an even higher standard would be more consistent with the policies noted above and the requirements that unions act in complete good faith and without hostility. In various contexts of labor law, standards ranging from those used under the civil rights law, upward to higher standards, have been applied in mixed motive cases but in none of the contexts has one as lax as that announced by the Seventh Circuit here been approved. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (NLRB reasonably could adopt standard of Title VII); *Bradford v. Textile Workers Local 1093*, 563 F.2d 1138, 1143 (4th Cir. 1977) (under LMRDA plaintiff need prove only that protected speech was "a" cause of adverse action, not the "primary" cause); *Petromale v. Local 17 of Laborers International Union*, 736 F.2d 13, 18 (2d Cir.), *cert. denied*, 469 U.S. 1087 (1984) (if valid reasons are inextricably intertwined with intent to suppress speech, conduct violates LMRDA even if union would have imposed discipline in absence of that speech); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1470 (6th Cir. 1992) (applying Title VII standard to LMRDA case, while noting that some Circuits apply stronger standard); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (under Railway Labor Act, "[a]nti-union motivation invalidates even a discharge which could be justified on independent grounds").

The standard applicable to fair representation cases is an important and recurrent issue, which should be settled by this Court. The holding below that the union is to be absolved automatically if it acted with mixed motive in bargaining should be reviewed and rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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